IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 676 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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NASIRKHAN SULTANKHAN PATHAN & 2 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR MA KHARADI for Appellant(s) : 1 - 3.
MR JM PANCHAL,SPL PP Assisted by MR RC KODEKAR, APP for respondent

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE MD SHAH
Date : 25/01/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. By way of filing the present appeal, the appellants, Nasirkhan Sultankhan Pathan,

Sadiqkhan Sultankhan Pathan and Samsherkhan Sultankhan Pathan, have challenged the impugned order passed by the learned Special Judge (POTA), Ahmedabad, in Criminal Misc. (Bail) Application No.2738 of 2003 in POTA Case No.1 of 2003 whereby the application filed by the appellants for bail was rejected.

2. The appellant No.1-Nasirkhan Sultankhan Pathan (original accused No.11), and No.2-Sadiqkhan Sultankhan Pathan (original accused No.12) were arrested on 27-2-202 while appellant No.3-Samsherkhan Sultankhan Pathan (original accused No.23) was arrested on 28-2-2002 in connection with the FIR being I.C.R.No.9 of 2002 for the offences punishable under Secs.143, 147, 148, 149, 337, 338, 334, 153-A, 302 and 307 of the IP Code, Secs.141, 151 and 152 of the Indian Railways Act, Secs.3 and 4 of the Prevention of Damages to Properties Act and under

Secs.3(2) and 3(3) of the Prevention of Terrorism Act, 2002 for the alleged offence of burning of coach No.S/6 of the Sabarmati Express on 27-2-2002 at 7.45 a.m. near “A” Cabin at Godhra Railway Station resulting in the death of 59 persons and causing serious injuries to 48 persons and also causing damage to the railway properties.

3. Since detailed discussion of the version given in the police papers has been made by the learned Special Judge (POTA), the same are again not reproduced in this judgment. When the train reached the Godhra Railway Station at about 7.43 a.m. i.e. much later than its scheduled time of 2.55 a.m. and after the train started at 7.48 a.m., the chain was pulled around 7.50 a.m. The train started again at 7.55 a.m. but after some distance, the chain was pulled again simultaneously from four compartments at 7.58 a.m. and it stopped only about 332 meters

away from the platform near “A” Cabin and the incident is alleged to have happened around 8.00 a.m. when a large number of people from a nearby area including from Signal Faliya had attacked and set on fire the said S/6 compartment. The police papers state that petro cans which were stored in the nearby Aman Guest House in the previous evening were used for setting the compartment on fire. At the time when the train halted, members who wanted to attack the compartment from the mob, pelted stones, banged iron pipes, lathis etc. and by cutting open the vestibule, entered the S/6 compartment, poured inflammable substances like petrol in it and set it on fire. The persons forming an unlawful assembly tried to prevent the passengers from getting down from the burning coach. R.P.F. and other police people reached on the spot and tried to control the mob by firing a few shots. However, the incident

appears to have occurred in a very well planned and swift manner, because, within few minutes of halting of the train, it was attacked by a huge mob, armed with lethal weapons and cans of inflammable materials like petrol, kerosene and acid were soon brought and S/6 compartment was set ablaze wherein 59 persons were charred and 48 persons were seriously injured.

4. The FIR was lodged by the engine driver Rajendrarao Raghunantrao Jadav at about 9.35 a.m. on 27-2-2002. A report under Sec.173(2) of Criminal Procedure Code (“Code” for short) was submitted by police on 22-5-2002 qua 54 accused. Reports/Supplementary charge sheets under Sec.173(8) of the Code were sent qua seven accused on 20-9-2002; qua three accused on 19-12-2002, qua two accused each on 16-4-2003 and 4-5-2003, qua one accused on 19-5-2003, qua six accused on 3-10-2003, qua two accused on 11-7-2004 and qua three accused

on 3-9-2004. Earlier on 2-3-2002, Dy. S.P., Western Railway, requested the Judicial Magistrate (First Class) to add offence under Sec.3(1)(a)(b) of the Prevention of Terrorism Ordinance 2001 (POTA, 2001). Thereafter on 25-3-2002, a communication was sent to learned Judicial Magistrate to keep in abeyance the said provisions of POTA, 2001 at that stage. Thereafter, a request was made by the Dy. S.P., Western Railway to add the offences under Section 3(2)(3) of the Prevention of Terrorism Act, 2002 (hereinafter referred to as “the Act” for short)vide communication dated 18-2-2003 addressed to the learned Addl. Sessions Judge.

5. In view of the provisions of Sec.56 of the Act, the provisions of the Act have an overriding effect over the provisions of any other enactment. Secs.49(6) and 49(7) of the Act impose additional restrictions on

granting of bail. However, in view of the proviso to Sub-section (7), these restrictions will not apply after the expiry of one year from the date of detention of the accused for an offence under the Act. The bail application in this case was made admittedly one year after the accused was detained.

6. The appellants preferred application for bail being Criminal Misc. (Bail) Application No.2702 of 2003 in POTA Case No.1 of 2003 under Sec.49 of the Act read with Sec.437 of the Code. On affording opportunity of hearing to the parties concerned and on going through the evidence on record, the learned Special Judge (POTA) rejected the said application, which is giving rise to prefer the present appeal.

7. While rejecting the said application, the learned Special Judge (POTA) observed that the witnesses, who were discharging their

duties at the relevant time, gave the names of the appellants along with the respective weapons carried by them in their statements recorded. In view of their respective posting in the law and order protecting force and their acquaintance with the people of the area, their presence did not create any doubt in the mind of the Court. The appellant No.1 was found with an iron rod while the appellant No.2 with a wooden stick which were not usually carried in public. If they were there out of curiosity, there was no necessity to carry those weapons with them. It was further held by the court below that there was not only the criminal conspiracy to burn the train but there was preparation to execute the said conspiracy on the previous day and before. The factors such as purchase of petrol, collection of the same at a secret place, gathering of information about arrival of the train, instigating people under the

pretext of abduction of a girl, stopping the train at the area where dominantly people of particularly community resided and gathering of a huge crowd within no time at the place of the incident were taken into consideration by the court below coupled with the fact that admittedly 59 persons were killed of whom 27 were children and women. The appellants were arrested on the next day with the respective weapons. It was also held by the court below that the appellants were not regular passengers travelling in the train but were there as part of the unlawful assembly for execution of their conspiracy. Since the prima facie involvement of the appellants was found from the statements of these witnesses referred to by the court below, their bail application was rejected.

8. We have heard learned counsel for the appellants, Mr.Kharadi and learned Special Public Prosecutor, Mr.J.M.Panchal, for the

respondent-State assisted by learned APP, Mr.R.C.Kodekar.

9. Mr.Kharadi, learned counsel for the appellants, submitted that two witnesses i.e. prosecution witness No.198 and 207 named the appellant Nos.1 and 2 (accused Nos.11 and 12) while one witness i.e. ASI Chatrasinh Gambhirsinh named the appellant No.3 (accused No.23). The appellant No.1 was found with iron pipe, appellant No.2 with iron rod and appellant NO.3 with a wooden stick in the mob with the others with lethal weapons like daggers, swords or a plastic container with inflammable substances. According to him, there is no iota of evidence to connect the present appellants with the crime in question except the statements of above referred witnesses. He further submitted that names of the appellants were not reflected in the FIR. According to him, there are two types of conspiracies in the present incident out of

which, the present appellants were not shown as conspirators in the first part of conspiracy who have conspired in the incident. The appellants can at the most be connected with the second part of conspiracy and that too vis-a-vis the evidence of witnesses present at the time of incident and hence, the role of the appellants cannot be considered with the core group who have conspired the main offence. He further submitted that there are no other independence evidence connecting the appellants with the crime in question. Taking us through the above referred statements along with other statements upon which reliance has been placed apart from the reasoned order passed by the court below, he submitted that the appellants are totally innocent and they have been involved in the crime in question only on the ground of they being from the minority community. He

further submitted that no test identification parade has been held and hence, credibility of the evidence of the aforesaid witnesses is required to be ignored. In the above facts and circumstances, it is requested that the appellants may be enlarged on bail.

10. Learned Special Public Prosecutor, Mr.J.M.Panchal, took us through the relevant statements of witnesses recorded under Secs.164 of the Code and Sec.32 of the Act as regards the nature of conspiracy. He submitted that there was sufficient prima facie material to show that a watch was being kept for the arrival of the train as a part of conspiracy. Taking us through the relevant papers, he submitted that 7-8 containers of petrol of 20 litres each were brought in the previous night and stored at the Aman Guest House, which is very near to the place of the incident. To stop the train near “A” Cabin, i.e. the place

convenient to attack from the nearby Signal Faliya and other localities, chain pulling was done in four compartments. The mob was instigated to carry on their attack by announcements from a nearby mosque. The movement of containers in which inflammable material was brought and the compartment was set on fire were seen by various witnesses. According to him, the gathering of such a huge mob and attacking with lethal weapons by setting the compartment on fire with inflammable substances within minutes of halting the train would clearly establish the formation of an unlawful assembly and hatching of conspiracy to achieve the common object. Because of the incident, riots broke out in the city and the injured had to be looked after and inquest panchnama was to be drawn. Apart from that, several persons were taken in custody on the spot and in view of the magnitude of the incident, arrest

panchnamas could not be drawn immediately but could be drawn later on in the evening and statements of the police personnel apprehending some of the accused on the spot were recorded on 1.3.2002. In view of the aforesaid, it cannot be said that the evidence appearing against the appellants is concocted. Lastly, after taking us through relevant statements of witnesses who have involved the appellants, he submitted that the presence of the present appellants with their active role has been prima facie established on the spot along with lethal weapons. He further submitted that as the offence attracted the provisions of Section 120-B of IPC, it would be enough if the accused are present there. However, there are statements of prosecution witnesses regarding their involvement in the conspiracy part also. In addition to the above, there are statements of other witnesses i.e.

prosecution witness No.198 and 207 who named the appellant Nos.1 and 2 (accused Nos.11 and 12) and prosecution witness, ASI, Chatrasinh Gambhirsinh who named the appellant No.3 (accused No.23). Generally there will not be any direct evidence as regards hatching of conspiracy is concerned. Here in this case, according to him, there are evidence on record to that effect also on the basis of documentary evidence and on the basis of statements recorded under Sec.164 of the Code or Sec.32 of the Act. In view of the above, he requested that the appellants may not be released on bail.

11. The entire evidence shown to us by the learned counsel for the respective parties together with the well reasoned order of the court below pertaining to the case has been gone in detail by us. The submissions made by the learned counsel appearing for the respective parties were also considered by

us. We would not be able to opine on the reliability or otherwise of the evidence on any argumentative grounds. According to us, statements recorded of the witnesses under Section 164 of the Code and under Section 32 of the Act as well as other record prima facie indicate that substantial quantity of inflammable substance like petrol had been accumulated at a nearby place prior in point of time and immediately the train was halted by pulling chain at about 8.00 a.m. on 27-2-2002, S/6 compartment was set on fire with the same. It is clear from the statements that two meetings had taken place in the Aman Guest House, Signal Faliya, Godhra in the night of 26-2-2002 from where specific instruction of Maulvi Hussain Umarji for setting S/6 compartment of the Sabarmati Express coming from Ayodhya on fire was communicated by Haji Bilal and Faruk Bhana. The owner of the guest house

and his accomplice were given the work of collecting petrol in the night of 26-2-2002 itself and 140 litres of petrol were collected from a nearby petrol pump and kept in Aman Guest House in the night of 26-2-2002 and as a part of conspiracy, the movement of train was verified from the Godhra Railway Station in the early hours of 27-2-2002. Soon after the first chain pulling was done at the platform immediately after the train started, the chain pulling was done simultaneously from various compartments. Thereafter, the petrol cans stored at Aman Guest House were taken in a goods rickshaw near the "A" cabin and the compartment was set on fire by putting burning rags inside the compartment and through broken windows by the miscreants. Some of the miscreants forcibly entered the compartment by cutting open the vestibule and poured the petrol there. None of the passengers were

permitted to come out from the compartment by the miscreants by creating a terrorized atmosphere and also by beating them and pelting of stones. In order to instigate the mob, provocative slogans were announced through the loudspeaker from a nearby mosque. As a consequence of the above referred incident, 59 persons were charred to death and 48 persons were seriously injured apart from causing damage to the railway properties.

12. From the aforesaid, it is prima facie established that there is sufficient material to indicate that conspiracy was hatched for attacking the compartment in which Kar Sevaks were travelling from Ayodhya and that inflammable material was collected on the previous night of 27-2-2002 in the Aman Guest House, which was very near to "A" cabin where the train was halted after simultaneous pulling of chain from four

compartments and where a mob of 900 persons attacked the train and some of them set the S/6 compartment on fire by using petrol collected in the previous evening and the whole conspiracy was successfully completed. All the aforesaid prima facie indicate that it was a well thought out plan for achieving the common object of committing the crime in question.

13. On an evaluation of the facts and circumstances narrated hereinabove, we are of the opinion that the role attributed to the appellants along with the weapons has been established from the prima facie evidence appearing on record. It is clear that the appellant Nos.1 and 2 were arrested on 27-2-2002 while appellant No.3 was arrested on 28-2-2002 and were remanded to police custody. There is a recovery of iron pipe from the appellant No.1, iron rod from the appellant No.2 and wooden stick from the appellant

No.3. Moreover, there is a recovery panchnama to that effect also. Apart from the above, the presence of the appellant Nos.1 and 2 and their active role have been established from the statements of prosecution witness No.198 and 207 whereas presence and role of appellant NO.3 were established form the statement of ASI Chatrasinh Gambhirsinh. It is true that no test identification parade is held qua the appellants. However, the credibility of the evidence of witnesses cannot be doubted at this stage but it can be decided at the time of trial. It is clear that the appellants were rounded up at the earliest and there is recovery of weapons carried by them. It is not their case that they were the passengers travelling in the train. It is also not their case that they were part of the team which had gone to welcome those returning from Ayodhya. Further, it is not their case that they were there at the Railway Station for any social

cause. However, it is clear from the evidence prima facie appearing on record that they were there as part of the unlawful assembly for fulfilling their common object hatched in the conspiracy. Apart from the above, Hence, if the appellants are released on bail, it is more likely that they may not be available for trial looking to the facts that case against the appellants has been prima facie established. It may be noted that some accused are still absconding. Under the circumstances, we are not inclined to use our discretionary power in releasing the appellants on bail. Hence, this appeal is required to be rejected.

14. This appeal is hereby rejected.

15. Since the observations by this Court in this judgment are made for the purpose of deciding this appeal, the same may not prejudice the parties in trial.

(R.P.DHOLAKIA,J.) (M.D.SHAH, J.)

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